Custom Leather Designers, Inc. *and* United Food and Commercial Workers International Union, Local 100A, AFL–CIO. Case 13–CA–31451

July 19, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On February 25, 1994, Administrative Law Judge Walter H. Maloney issued the attached decision. The General Counsel filed an exception and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exception and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order, as modified.

The General Counsel's sole exception is to the judge's failure to include a make-whole remedy for the employees affected by the Respondent's unlawful unilateral changes in the initial terms and conditions of employment. We find merit in this exception, and shall modify the remedy and recommended Order accordingly.

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act. In addition to the actions set forth in the judge's decision, we shall order the Respondent, on the Union's request, to retroactively restore preexisting terms and conditions of employment, including wage rates and benefit plans, and make employees whole for any and all losses they incurred by remitting all wages and benefits that would have been paid absent such unilateral changes, from the initial hire until it negotiates in good faith with the Union to agreement or impasse. The lost wages shall be computed as in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall remit all payments owed to employee benefit funds and reimburse its employees in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), for any expenses resulting from the Respondent's failure to make these payments. Any additional amounts that the Respondent must pay into the benefit funds shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Custom Leather Designers, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) On request, rescind the wages, hours, and terms and conditions of employment unilaterally imposed on applicants for hire or any changes thereto, retroactively restore preexisting terms and conditions of employment, including wage rates and benefit plans, make employees whole for any and all losses they incurred by remitting all wages and benefits that would have been paid absent such unilateral changes, from the initial hire until it negotiates in good faith with the Union to agreement or impasse, as set forth in the remedy and amended remedy sections of the decision, and, on request, bargain with the Union as the exclusive bargaining representative of the production and maintenance employees.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with United Food and Commercial Workers International Union, Local 100A, AFL–CIO–CLC as the exclusive collective-bargaining representative of the production and maintenance employees at our Chicago, Illinois plant, excluding foremen, salesmen, chauffeurs, watchmen, office clerical employees and supervisors as defined in the Act.

WE WILL NOT unilaterally adopt initial terms and conditions of employment of bargaining unit employees or any changes in terms and conditions of employment.

WE WILL NOT discourage membership in or activities on behalf of United Food and Commercial Workers International Union, Local 100A, AFL–CIO–CLC or any other labor organization by refusing to hire members or otherwise discriminate against them in their hire or tenure.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, rescind the wages, hours, and terms and conditions of employment unilaterally imposed on applicants for hire or any changes thereto, retroactively restore the preexisting terms and conditions of employment, including wage rates and benefit plans, make employees whole for any and all losses they incurred by remitting all wages and benefits that would have been paid absent our unilateral changes, from the initial hire until we negotiate in good faith with the Union to agreement or impasse, and WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our production and maintenance employees.

WE WILL, in the event that we resume production, offer employment to bargaining unit positions to all former bargaining unit employees of Accurate Leather and Novelty Company, Inc.

WE WILL make whole all former bargaining unit employees of Accurate Leather and Novelty Company, Inc. for any loss of pay or benefits which they may have suffered by reason of the discrimination in hiring found in this case, with interest.

CUSTOM LEATHER DESIGNERS, INC.

Paul H. Hitterman, Esq., for the General Counsel.
Kenneth Ditkowsky, Esq., of Chicago, Illinois, for the Respondent.
Salley A. Stix, Esq., of Madison, Wisconsin, for the Charging Party.

DECISION

FINDINGS OF FACT

A. *Statement of the Case*

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me on an unfair labor practice complaint,[1] issued by the Regional Director for Region 13 of the National Labor Relations Board, which alleges that Respondent Custom Leather Designers, Inc. (Respondent or Custom)[2] is either an alter ego or a successor to Accurate Leather and Novelty Company, Inc. (Accurate) and, as such, violated Section 8(a)(1), (3), and (5) of the Act. One theory propounded by the General Counsel is that Accurate discharged the members of its unionized bargaining unit for discriminatory reasons, refused to hire them to work for the alter ego business, and refused either to apply Accurate's existing contract to Custom's employees or to recognize and bargain collectively with the Union as the representative of Custom's employees. The General Counsel alleges in the alternative that Custom is the successor to Accurate, that it discriminatorily refused to hire Accurate's former employees to prevent the Union from becoming the majority representative of Custom's employees, and that it made unilateral changes in terms and conditions of employment without bargaining with the Union. The Respondent denies that the Board has jurisdiction to determine this case because Accurate is in bankruptcy and the trustee appointed by the U.S. Bankruptcy Court has not been joined as a party. It also asserts that Custom is neither the alter ego nor the successor to Accurate but an independent business, that it had no duty to hire former Accurate employees, and that the Union was never the majority representative of its employees so it had no duty to bargain with it before adopting or changing terms and conditions of employment of bargaining unit employees. On these contentions the issues here were joined.[3]

B. *The Unfair Labor Practices Alleged*

For many years Accurate operated a factory at 1731 West Belmont in Chicago where it manufactured various lines of leather wearing apparel and accessories. Like Custom, it was a closely held business owned and operated by the Mallon family. The elder Mallon, Jack, founded the firm with his father in the 1940s and owned most of Accurate's stock. He was president of the corporation and active in the day-to-day operation of the firm although he took a diminishing role as he got older. His son, Mark, was Accurate's secretary and a small shareholder. He handled much of the sales, finance, and internal administration of the Company. Jack's other son, Mitchell, was not a shareholder but worked for the Company for 22 years. He was in charge of all production, made several business trips to South America to find suppliers and possible subcontractors, helped to develop lines of product which would be salable in a rapidly changing market, and handled employee disciplinary matters, including the adjustment of grievances with union representatives.[4]

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[1] Respondent admits, and I find, that it is an Illinois corporation which maintained a place of business in Chicago, Illinois, where it manufactured leather goods. In the course and conduct of this business, the Respondent annually manufactured and shipped directly to points and places outside the State of Illinois goods and merchandise valued in excess of $50,000. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. United Food and Commercial Workers International, Local 100A, AFL–CIO–CLC is a labor organization within the meaning of Sec. 2(5) of the Act.

[2] The charge was filed here by United Food and Commercial Workers International Union, Local 100A, AFL–CIO–CLC (the Union) against the Respondent on January 15, 1993; the complaint was issued against the Respondent by the Regional Director for Region 13 on February 26, 1993; Respondent's answer was filed on March 8, 1993; the hearing was held in Chicago, Illinois, on November 1 through 3, 1993; and General Counsel's brief was filed on or before December 13, 1993. Following the hearing, the Respondent's counsel filed two motions, neither of which are permitted by the Board's Rules and Regulations, in which he moved to dismiss the complaint and in which he made certain arguments relating to the merits of the case. I will treat the substance of those motions as a posttrial memorandum while denying the relief sought there. Following the filing of the General Counsel's brief, the Respondent filed with me a reply brief and the General Counsel filed a motion to strike that brief. The Board's Rules and Regulations permit only simultaneous briefs to an administrative law judge and make no provision for reply briefs at this stage of litigation. Accordingly, the Respondent's reply brief is stricken.

[3] The transcript is noted and corrected.

[4] On more than one occasion Mitchell wrote letters terminating Accurate's sales representatives in which he signed his name as vice president. This public representation of authority was never disavowed. On several occasions Jack took Mitchell to New York, where Accurate maintained a sales office, and introduced him to a number of Accurate's clients.

Accurate operated out of a four-story building which was owned by Jack and his wife, Pearl Mallon. The business was somewhat seasonal, experiencing an increase in orders in the late summer and fall of each year in anticipation of Christmas sales, and a decline thereafter. For many years, Accurate was a member of the Chicago Luggage and Leather Goods Manufacturers Association (the Association) and, through the Association, bargained with the Union's predecessor, Local 415A,[5] as the representative of its production and maintenance employees. The Association concluded a series of contracts with the Union, one of which expired on September 30, 1993.[6] When it was in operation, Accurate had at various times as many as 150 production and maintenance employees. When it closed its doors on May 29, 1992, it employed about 50 bargaining unit employees.

In June 1990, Accurate arranged for a loan and line of credit from Cole Taylor Bank of nearly $3 million. Accurate gave Cole Taylor a security interest, evidenced by a financing statement, in all of Accurate's inventory, accounts, and fixtures and also gave Cole Taylor a mortgage on its Belmont Street building. Accurate was required to do all of its banking through Cole Taylor and maintained both a payroll account and a general account at that bank. A restructuring of the loan was negotiated in January 1992 by Mark, who handled most of Accurate's financial affairs.

In August 1991, the premises adjacent to Accurate's building caught fire. To suppress the fire, the Chicago Fire Department used the fourth floor of Accurate's building and, in the process of doing so, flooded most of Accurate's building, and did substantial and irremediable harm to a large amount of leather goods which Accurate was holding in inventory or as work in process. Accurate was never paid by its insurance carrier for a business interruption claim and began to experience cash flow problems. As a result of its loss of inventory and its already financially strapped position, it fell behind in meeting various obligations, including health and welfare payments to various union trust funds. When Accurate ceased doing business in May 1992, it was 9 months in arrears in making these payments. On April 1, 1992, Cole Taylor called its note and Accurate and its guarantors, namely, Jack, Mark, and Pearl, were unable to meet the obligation, which, at that time, exceeded $2.4 million. Efforts were made to obtain alternative financing from the La Salle Bank, but those efforts proved unsuccessful.

Cole Taylor allowed the business to continue for another 8 weeks but stationed a representative on the premises to oversee the operations. On May 29, 1992, Cole Taylor notified the Mallons that it had seized the bank accounts which Accurate had maintained in its establishment and was dishonoring employee paychecks that had been issued the previous week by applying the credit in the Accurate payroll account to the unpaid principal of the outstanding note. About 3 p.m. on May 29, Jack called a meeting of all employees on the third floor of the factory. He told them what Cole Taylor had done and that the Company could not pay them, because the bank had taken control of the Company's assets. He said that they would try to open another factory so that they could pay employees little by little but there would be no further production at Accurate. The bank seized all the inventory and work in progress and all the fixtures. It asked the Mallons to deed the building to the bank in order to avoid a foreclosure, but they refused. Through its attorney, Accurate informed Cole Taylor that the Company had about $100,000 worth of work in progress to fill existing orders and asked permission to complete this work and apply the proceeds of the sales to the unpaid wages which had resulted from the seizure of the payroll account. Cole Taylor refused. The Mallons vacated the building the same afternoon. The only items removed from the building thereafter by anyone other than the bank were machines owned by various leasing companies which were not subject to the provisions of the Accurate-Cole Taylor financing agreement.

On the same day that the Accurate business was seized by the bank, Jack, Mitchell, and Mark executed articles of incorporation of Respondent Custom. These articles were filed with the Illinois Secretary of State and approved about 3 weeks later. Eugene Stemwedel, business manager of the Union, contacted Mitchell on May 29 after receiving word from the shop steward at Accurate that the factory was closing. He asked Mitchell about unpaid wages and vacation money due to the laid-off employees. Mitchell's only reply was that the Company was in negotiation with the bank about allowing the Company to complete goods in process and apply the proceeds to these wage claims, but nothing had been resolved. When the Union received no further word from any of the Mallons about payment, it filed a petition in mid-June to place Accurate in bankruptcy. A trustee was appointed to take control of Accurate's assets and the bankruptcy case is still pending.

While Accurate was still operating, Mitchell began to develop a business relationship with the Harley-Davidson Company, headquartered in Milwaukee, for the production of a line of leather wearing apparel which Harley-Davidson could sell to purchasers of motorcycles. Ten days before the closing of Accurate, Mitchell signed and sent to Harley-Davidson a sales order for $102,000 worth of purses and belt pouches. The order had a July 15 delivery date. During the interim period between the closing of Accurate and the onset of production by Respondent Custom, Mitchell was in negotiation with Harley-Davidson officials to obtain Harley-Davidson business for Custom and was successful in doing so. Mitchell testified that, without Harley-Davidson's orders, Custom would not have been able to function.[7]

[5] The General Counsel adduced uncontradicted evidence that, on November 1, 1992, Local 415A merged with Local 100A, following which the Respondent conceded that Local 100A is the successor to the union with which the Leather Goods Association had bargained for many years.

[6] The record is silent as to whether there is now in existence a subsequent collective-bargaining agreement involving Local 100A and the Association but that fact would have little bearing on the outcome in this case. Custom was never a member of the Association.

[7] In August, Custom submitted a detailed written proposal to Harley-Davidson to operate as the leather goods division of the latter firm. In that proposal Mitchell, representing himself as president of Custom, and Jack, representing himself as chairman of the board, made a detailed disclosure to Harley-Davidson of its operation, its capital, and its need for personnel and machinery as well as what it could produce. The offer was never accepted. I credit testimony in the record that, after Harley-Davidson officials agreed to do business with Custom, a representative of Cole Taylor Bank approached them and asked them to switch their business from Custom to an-

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During the month of June, Custom, operating under Mitchell's leadership, began looking for capital and a place to operate. Jack borrowed $315,000 from friends and, together with his wife, invested the sum in the Custom operation. He became chairman of the board. Mitchell, whose capital contribution to Custom amounted to about $1000, became president and was Custom's full-time operating chief. Mark testified that he did not want to have anything more to do with the leather goods business after his experience at Accurate but did agree to help his brother and his father. He was employed by Custom as salesman for several months.[8] Moises Jedwabnik, familiarly known as ''Bernardo,'' a long-time supervisor for Accurate, was employed in the same position by Custom and was also elected a member of its board of directors. This was an empty honor, since the board met only twice in a 13-month period and these meetings were perfunctory in character.

On June 18, Harley-Davidson canceled the order that it had placed with Accurate and placed a similar order 7 days later with Custom. This cancellation and reordering was done at Mitchell's request. During this period of time, Harley-Davidson dealt with Mitchell at his home address in Desplaines, Illinois. Custom obtained a factory site late in June at 4330 West Belmont in Chicago, about 3 or 4 miles from the Accurate factory. At first, it occupied part of a factory site owned and operated by Wheeler Protective Clothing. Later, it took over the entire Wheeler plant when Wheeler went out of business and, in fact, purchased some of Wheeler's machinery.

Custom obtained its lease from Wheeler on June 29 and began production almost immediately thereafter. By October 1, Wheeler had gone out of business so Custom arranged to utilize the entire building. As noted, it began to lease machinery from the same suppliers that had been furnishing machines to Accurate.[9] Before Accurate closed, Mitchell placed with Neuberger Brothers, Inc., a leather supplier, an order for South American water buffalo skins to fill the Harley-Davidson's order. These skins are an unusual commodity in the leather goods industry. When Accurate closed, the order was in transit to Neuberger so Mitchell canceled the order and, after Custom began production, again placed with Neuberger the same or similar order. Custom then received the water buffalo skins from Neuberger and began to use them in filling the Harley-Davidson's order.[10] Mitchell testified that suppliers who had done business with Accurate extended credit to Custom even though Custom had no collateral to secure payment for goods which were ordered.[11] Harley-Davidson also gave Custom cash advances which accompanied the orders which it placed.

When Custom opened in late June or early July, it began production with two or three employees, a number which was soon increased to six or eight. By the end of July, it had 17. Mitchell testified that at no time did Custom have more than 27 employees. Custom employed four supervisors who had worked for Accurate and also employed two office clerical employees who had also worked for Accurate. However, it hired only five bargaining unit employees, preferring to obtain its new hires from the Illinois Job Service and Asian Human Services.[12] When Mitchell was asked why he preferred to hire individuals who, in some instances, were transients rather than call laid-off Accurate employees back to work, he replied that he ''felt [it] would be bringing on a lot of aggravation on myself. People had not been paid for two weeks which I tried to see that they get paid and I couldn't. They were upset, understandably upset. And I felt I'd be bringing a lot of headache into my company by bringing them in.''

Sometime in August 1992, Stemwedel called Mitchell on behalf of the Union and asked Mitchell why Custom was not Union and asked him if he was in business. He also asked Mitchell why Custom was not employing any of Accurate's former employees inasmuch as they were in the same line of work. Mitchell denied that Custom was in the same business as Accurate and told Stemwedel that he would not hire any of Accurate's former employees. Stemwedel argued that the Union had a contract which covered Custom's employees if Custom was in the same business that Accurate had been, i.e., producing the same items for the same customers. Mitchell made no reply other than to say that Custom was not producing exactly the same product. Shortly thereafter, Stemwedel sent Mitchell a formal written demand for recognition and bargaining.

Sometime in November 1992, Charles Barton, the Union's vice president, phoned Mitchell and told him he would like to meet with Mitchell and discuss the differences that had arisen between Custom and the Union. Mitchell said that he was busy at the time but would meet with the Union after the Christmas holidays. In January 1993, Barton called again and repeated his request for a meeting. Mitchell said that he would ''get back'' to Barton, but he never did and the Union made no further effort to contact Custom. On January 15, 1993, it filed the charge in this case.

Mitchell admitted that Custom never recognized the Union (or its predecessor), never bargained with it, and never agreed to pay any of the bills which Accurate had left outstanding, including unpaid wages which accrued in late May

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other leather goods company with which the bank was doing business. Harley-Davidson refused.

[8] There is a conflict in testimony concerning Mark's compensation as an employee of Custom. Mark testified that he received no wages nor salary and was reimbursed only for expenses. Mitchell testified that his brother received $1000 a month plus expenses. Mitchell's testimony on this point is more probable and I credit it.

[9] There is testimony in the record from a Custom employee that the machines rented by Custom were in fact the identical machines which had been used at Accurate and which presumably had been repossessed on the closing of the Accurate factory. I am reluctant to find on the basis of this testimony that the machines used in both factories were identical simply because the witness did not explain how he could pinpoint their identities exactly. However, it does not really matter because it is clear that the production machinery used in both shops was the same kind, from the same source, even if they were not the identical equipment.

[10] Mitchell testified that he could not say definitely that the skins which Custom received from Neuberger were the identical skins which Accurate had ordered from Neuberger, but it is certain that they were the same commodity. He admitted that the 3600 skins he received were not an item which Neuberger would typically have in stock.

[11] One such creditor, Neuberger, advanced Custom a substantial amount of credit and is now suing Custom for nonpayment. The amount in question appears in the record at various figures between $10,000 and $30,000.

[12] Almost all the Accurate bargaining unit was composed of Hispanic employees and several of its supervisors were Hispanic.

when Cole Taylor seized Accurate's payroll account and applied it to the outstanding loan. Both initial terms of employment of Custom's employees and any changes made thereafter were unilaterally established by Mitchell. Sometime in 1993, Custom closed its doors, laid off its employees, and ceased doing business. It was out of business at the time of the hearing in this case.

C. *Analysis and Conclusions*

1. Asserted preemption of the Board case by the Bankruptcy Court

Since June 1992, Accurate has been in bankruptcy as a result of a petition filed by the Union to collect back wages for employees, as well as health and welfare contributions which were due and owing by Accurate. Respondent Custom argues that the jurisdicdtion of the Board to proceed against it in this case has been preempted by the pending bankruptcy proceeding involving Accurate and that, at the very least, the trustee in bankruptcy of the Accurate estate should have been joined in this case as a necessary party. The contentions are without merit.

Respondent Custom's argument was laid to rest by the Supreme Court in *Nathanson, Trustee in Bankruptcy for MacKenzie Coach Lines v. NLRB*, 344 U.S. 25 at 30 (1952), as follows:

> The bankruptcy court normally supervises the liquidation of claims. [Citations omitted.] But the rule is not inexorable. A sound discretion may indicate that a particular controversy be remitted to another tribunal for litigation. [Citation omitted.] And where the matter in controversy has been entrusted by Congress to an administrative agency, the bankruptcy court normally should stay its hand pending an administrative decision. That was our ruling in *Smith v. Hoboken R. Co*., 328 U.S. 123, and *Thompson v. Texas M. R. Co*., 328 U.S. 134, where we directed the reorganization court to await administrative rulings by the Interstate Commerce Commission before adjudicating controversies before it. Like considerations are relevant here. It is the Board, not the refereee in bankruptcy nor the court, that has been entrusted by Congress with authority to determine what measures will remedy the unfair labor practices. We think wise administration therefore demands that the bankruptcy court accommodate itself to the administrative process and refer to the Board the liquidation of the claim, giving the Board a reasonable time for its administrative determination.

A legislative recognition of the Board's role in liquidating claims of employees of a bankrupt is found in 11 U.S.C.A. § 362 (1979), which states:

> (b) The filing of a petition under Section 301, 302, or 303 of this title does not operate as a stay—
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> . . . .
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> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's policy or regulatory power;
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> (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in such an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

An enforcement proceeding undertaken by the Board in a United States court of appeals has been held to be a proceeding by a governmental unit to enforce that governmental unit's regulatory power, within the meaning of the abovecited provisions of the Bankruptcy Code, and hence not subject to the automatic-stay provisions of that Act. *NLRB v. Evans Plumbing Co*., 639 F.2d 291 (5th Cir. 1981). These legal authorities have even more cogency in this case since the General Counsel is not seeking any remedy against Accurate or its bankruptcy trustee but against another legal entity, namely, Custom, which is not a party to that bankruptcy proceeding. Accordingly, the Respondent's arguments in this regard must be rejected. See *Airport Bus Service*, 273 NLRB 561 (1984).

2. Deferral to arbitration

With an elaborate citation of judicial authority to the effect that the policy of the law is to favor arbitration, Respondent argues that the Board should defer to the grievance-and-arbitration machinery found in a contract, now expired, between Accurate and the Union. This argument ignores the fact that Custom was not a party to that contract and that Mitchell flatly stated that he did recognize the Union and had not followed the Accurate contract in establishing wages and other terms and conditions of employment in operating Custom. The Board has its own policy pronouncement concerning when it will and will not defer to arbitration. *United Technologies Corp*., 268 NLRB 558 (1985). However, the Board has never deferred to arbitration where, as here, all of those involved in the alleged unfair labor practice are not parties to the agreement giving rise to a duty to arbitrate. *Masters, Mates, & Pilots (Seatrain Lines)*, 220 NLRB 164 (1975). The policy of nondeferral includes situations in which one of the parties to an unfair labor practice proceeding is the successor to an employer who is bound by a collective-bargaining agreement but is not itself bound by any agreement to arbitrate. *Retail Employees District 1199E (Greater Pennsylvania Avenue Nursing Center)*, 238 NLRB 9 (1978). Accordingly, there is no reason for the Board to defer to the arbitration provision in a contract to which the Respondent insists it is not a party.

3. The successorship issue

The General Counsel alleges, in the alternative, that Custom is either the alter ego or the successor in interest to Accurate and, as such, had a duty to apply the Union's contract to its employees or to bargain with the Union over either initial terms and conditions of employment of Custom employees or any changes there. The General Counsel also alleges that Custom discriminated against laid-off Accurate employees in assembling its work force and did so in order to avoid a bargaining obligation with the Union. In my opinion, the

facts of this case illustrate a successor situation rather than an alter ego.[13]

The elements of both relationships are similar and the Board has had many occasions to articulate these elements. To find an alter ego, the two entities should have substantially identical ownership, management, business purpose, operation, equipment, and customers. *Goldman-Feldman, Inc*., 295 NLRB 351 (1989); *Yerger Trucking*, 307 NLRB 567 (1992), and cases cited there at 575. Not all of these factors must exist in every case. Normally, in an alter ego situation, an element of fraud or deceit aimed at avoiding the impact of labor laws exists, although this is not an essential factor. Usually, in *alter ego* situations, both companies continue to exist and function simultaneously, such as a double-breasted operation in the building and construction industry. See, for example, *Samuel Kosoff & Sons*, 269 NLRB 424 (1984). However, this, too, is not an essential factor.

Since, however, the principal focus of the alter ego doctrine is normally on an attempt to avoid collective-bargaining obligations through sham transactions or technical changes of operation, the relationship of Accurate to Custom more readily lends itself to a finding of a successorship. The demise of Accurate and the decision to establish Custom were not the result of a devious plot on the part of the Mallons to evade the labor laws. They were part of a plan to avoid unemployment. In what appears to be a heavyhanded and oppressive effort to collect a promissory note, Cole Taylor seized the assets of Accurate, terminating the business, and leaving its employees not only without jobs but without paychecks for the final 2 weeks of their employment. The Mallons had nothing to do with this chain of events and were perhaps its principal victims. Custom was originally established not to thwart the Union or the Act but to salvage something from a lifetime of activity in the leather goods industry.

Having said this, it is clear that Custom was at least a successor of Accurate. It had the same owners, the Mallons; it operated in the same employing industry, with the same type of machinery making the same type of product. Custom had the same or similar upper management, namely, Mitchell and Jack Mallon; it also had many of the same customers. While Harley-Davidson, who provided Custom with the bulk of its business, constituted only a fragment of the Accurate clientele, it was an Accurate customer whom the Mallons were cultivating when the axe fell and Accurate went out of business. A part of Custom's sales effort, particularly that of Mark, was to broaden the customer base of Custom and to do so by approaching the same major department stores and other retail outlets whom Accurate had been serving for years. The New York salesroom which Accurate maintained for many years was used by Custom for this purpose after Accurate ceased to exist. The supervisory force used by Custom was similar, though smaller, than the supervisory force employed by Accurate.

Normally a successor is entitled to set the initial terms and conditions of employment of its newly hired employees and is under no duty to bargain with a union representing its predecessor's employees until it employs a substantial and representative complement of those employees in the new business. *Fall River Dyeing Co. v. NLRB*, 482 U.S. 27 (1987). In this regard, a normal successorship differs from an alter ego, which is obligated to adhere to the old contract and recognize the bargaining agent of the employees of its twin. *O'Neill, Ltd*., 288 NLRB 1354 (1988). Where the Mallons fell short of their legal obligation was not in setting up a new corporation but in assembling its work force thereafter.

The record contains several references of the affection of the Mallons for their longtime employees, whom they regarded as ''family'' and for whose reliability and expertise they had high regard. It was to former Accurate employees that Custom looked when it sought both supervisory and office employees. However, when it came to hiring new bargaining unit employees, it preferred to hire strangers who had no background in the leather goods industry and ended up hiring only about 5 family members out of a total complement of 20 or more. When Mitchell was asked why he went to employment agencies for help rather than to laid-off Accurate employees, his reply was that he did not want the ''headache'' of having on his payroll people who felt they were entitled to money as a result of their dishonored paychecks from Accurate. Their presence would mean ''aggravation'' which Mitchell did not want in opening a new business.

No other explanation for Custom's hiring policy exists in the record or in the written arguments filed with me. The failure of Custom to hire experienced, unionized employees, whose work had proved satisfactory in the past, indicates at the very least that its selection process was deliberate and was aimed specifically at them because of their status as former Accurate employees. The effect of not hiring Accurate's former employees was to deny the Union any possible majority status in a substantial and representative complement of Custom's employees. There can be little doubt that this is what Mitchell had in mind in July 1992 when Custom began operations, although I do not think this is what the Mallons had in mind late in May when disaster fell on them and before the Union took the step it did in mid-June to place Accurate in bankruptcy. Accordingly, I find that, by refusing to hire Accurate's bargaining unit employees (except in a few instances), Respondent Custom violated Section 8(a)(1) and (3) of the Act.

Because Custom established its work force on a discriminatory basis, it was not entitled to enjoy the normal freedom of a successor employer, which is to establish initial working conditions and to operate on a nonunion basis until the Union establishes its majority status. See *Howard Johnson Co. v. Detroit Joint Board*, 417 U.S. 249 (1974). The latter situation normally arises by the hiring of unionized employees of a predecessor to a majority of the positions which open up in the new bargaining unit. Since the discriminatory hiring policy of the Respondent prevented this event from occurring, it is obligated to bargain with the incumbent union of its predecessor concerning initial terms and conditions of employment and with regard to any changes which it wishes to make thereafter, notwithstanding the fact that the Union may not at first have been able to establish its majority status in the new unit through normal hiring processes. Respondent Custom may not avoid dealing with the Union at the outset of operation because of its failure to hire new employees on a nondiscriminatory basis, and when it refused to do so, it

[13] See *NLRB v. Pratt-Farnsworth, Inc*., 690 F.2d 489 (5th Cir. 1982), for an exhaustive analysis of the distinction between alter egos and successors.

violated Section 8(a)(1) and (5) of the Act. I so find and conclude. *Harvard Industries*, 294 NLRB 1102 (1989); *Weco Cleaning Specialists*, 308 NLRB 310 (1992). By refusing to recognize and bargain with the Union later on after the Union made a formal demand for recognition and bargaining on or about September 29, 1992, the Respondent again violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent Custom Leather Designers, Inc. is now and at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers International Union, Local 100A, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act, and is the successor of United Food and Commercial Workers International Union, Local 415-A, AFL–CIO, CLC.

3. All production and maintenance employees employed by Respondent Custom at its Chicago, Illinois place of business, excluding foremen, salesmen, chauffeurs, watchmen, office clerical employees, and supervisors as defined in the Act constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union, or its predecessor, has been the exclusive collective-bargaining representative of all employees employed in the unit found appropriate in Conclusion of Law 3 for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing to bargain with the Union or its predecessors concerning the initial terms and conditions of employment of the employees employed in the bargaining unit found appropriate in Conclusion of Law 3 and by failing and refusing to bargain with the Union concerning changes made in those terms and conditions of employment, and by failing to recognize and bargain with the Union at all in response to a formal demand as the exclusive collective-bargaining representative of the employees employed in the bargaining unit found appropriate in Conclusion of Law 3, the Respondent here violated Section 8(a)(5) of the Act.

6. By discriminatorily refusing to hire employees of Accurate Leather and Novelty Company, Inc. because of their membership in and activities on behalf of the Union or its predecessor, the Respondent here violated Section 8(a)(3) of the Act.

7. The aforesaid unfair labor practices constitute violations of Section 8(a)(1) of the Act and have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent here has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take other affirmative actions designed to effectuate the purposes and policies of the Act. Because the violations of the Act by this Employer are pervasive and evidence an attitude of disregard for its statutory obligations and rights of its employees, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress all violations of that section of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979). I will recommend that Respondent Custom be required, in the event that it reopens, to offer employment to laid-off Accurate employees to all of its bargaining unit positions and that it be required to make whole Accurate employees for any loss of earnings they may have suffered by reason of the discrimination in hiring which it practiced, in accordance with the *Woolworth* formula,[14] with interest thereon at the rate prescribed by the Tax Reform Act of 1986 for the overpayment and underpayment of income taxes. *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The recommended Order will also require the Respondent to recognize and bargain with the Union as the exclusive collective-bargaining representative of its unit employees with regard to initial terms and conditions of employment of any employees and any terms and conditions of employment of unit employees which are instituted thereafter. I will also require the Respondent to post the usual notice, advising their employees of their rights and of the results in the case. Because Respondent Custom is out of business, I will require it to mail a signed copy of the notice to all of its laid-off employees and to all of the laid-off employees of Accurate. All notices shall be printed in both English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Custom Leather Designers, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and to bargain collectively in good faith with United Food and Commercial Workers International Union, Local 100A, AFL–CIO–CLC as the exclusive collective-bargaining representative of the production and maintenance employees employed at its Chicago, Illinois plant, excluding foremen, salesmen, chauffeurs, watchmen, office clerical employees, and supervisors as defined in the Act.

(b) Unilaterally adopting initial terms and conditions of employment of bargaining unit employees or any changes in initial terms and conditions of employment.

(c) Discouraging membership in or activities on behalf of United Food and Commercial Workers International Union, Local 100A, AFL–CIO–CLC or any other labor organization by refusing to hire members or otherwise discriminating against them in their hire or tenure.

(d) By any other means or in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the polices of the Act.

(a) Rescind the wages, hours, and terms and conditions of employment unilaterally imposed on applicants for hire or any changes thereto and, upon request, bargain collectively with the Union as the exclusive collective-bargaining rep-

[14] *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

resentative of the Respondent's production and maintenance employees.

(b) In the event that it resumes production, offer employment in bargaining unit positions to all former bargaining unit employees of Accurate Leather and Novelty Company, Inc.

(c) Make whole all former bargaining unit employees of Accurate Leather and Novelty Co., Inc. for any loss of pay or benefits which they have suffered by reason of the discrimination in hiring found here, in the manner described above in the remedy section.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at the Respondent's Chicago, Illinois place of business copies of the attached notice, in English and Spanish, marked ''Appendix.''[16] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Copies of said notices, in English and Spanish, shall also be mailed by the Respondent to all of its laid-off bargaining unit employees and to all of the laid-off bargaining unit employees of Accurate Leather and Novelty Co., Inc. at their last known addresses.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''